No. 83-18

IN THE

Supreme Court of the United States

October Term, 1983

DUN & BRADSTREET, INC.,

Petitioner,

vs.

GREENMOSS BUILDERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

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The Charge to the Jury delivered by the Superior Court of Washington County, Vermont, is unreported. The pertinent portions thereof are printed in Respondent's Appendix at A1-A4.

STATEMENT OF THE CASE

1. The Facts.

On July 26th, 1976, Respondent, Dun & Bradstreet, Inc., (hereinafter D & B), published a notice that Respondent, Greenmoss Builders, Inc. (hereinafter Greenmoss) had filed a voluntary Petition in Bankruptcy. It is conceded that this report was totally false and groundless. In addition to falsely reporting that Greenmoss had filed bankruptcy, Petitioner grossly understated the assets and liabilities of Respondent. This report was so completely inconsistent with previous reports about Greenmoss obtained by D & B, particularly with respect to assets and liabilities, that D & B knew or should have known that the information about Greenmoss's bankruptcy was inaccurate.

The report was published because Petitioner's employee, a 17-year-old high school student who had been given no training by D & B, had mistakenly analyzed a Bankruptcy Petition filed in the United States District Court for the District of Vermont and inaccurately attributed the Bankruptcy Petition to Greenmoss. The evidence was that prior to the issuance of a credit report indicating a bankrupt business, D & B's routine practice and requirements mandated a check of the report's accuracy with the business

alleged to be bankrupt. D & B admitted that no pre-publication verification was ever attempted in this case.

Prior to the commencement of suit, D & B steadfastly refused to divulge to Greenmoss the names of the persons who had received the report. D & B's so-called corrective notice was forthwith objected to by Greenmoss as absolutely inadequate and requests by Greenmoss for a more comprehensive retraction notice were refused. Thereafter, without any factual basis, D & B changed the credit rating which it had previously established for Greenmoss and engaged in other persistent activity which adversely reflected on Respondent's creditworthiness.

2. The Proceedings Below.

The posture of the parties in this case is that Greenmoss is a "private" plaintiff, that is, a purely private figure as opposed to a public figure or public official. The Defendant concedes it is a non-media defendant engaged in the business of commercial credit reporting and admits it is not a consumer reporting agency. The defamatory statements of the Petitioner did not involve an issue of public interest. Commercial private speech is involved rather than public speech.

Petitioner's Answer to the Complaint and Affirmative Defenses, filed some two and one-half years before trial, asserted no Constitutional argument in defense of its actions. Indeed, not until the morning the trial commenced did D & B assert that the First and Fourteenth Amendments to the U.S. Constitution had any application in this case or that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), had any bearing on this litigation.

Prior to the jury's decision, Petitioner did not assert *Gertz* as an independent basis for protection. On the contrary, D & B took the position at the trial that, as a commercial credit reporting agency, it was entitled to the protection of a common law qualified privilege to defame. It was only in the context of the common law qualified privilege that D & B suggested the First and Fourteenth Amendment and *Gertz* had application to this litigation. Petitioner did not contend at the Trial Court level that it was entitled to *both* the protection of *Gertz* and the protection of the common law qualified privilege; it characterized *Gertz* as setting forth a standard that was coterminous with the common law qualified privilege.

Petitioner's requests to charge the jury, which the Trial Court adopted over the objection of Greenmoss, did not request a specific charge based on *Gertz*. D & B's requests were couched in the context of the qualified privilege existing at common law.

Subsequent to trial, Petitioner first asserted that the First and Fourteenth Amendments had independent application to this case and that *Gertz* should be extended to encompass non-media defendants.

In adopting D & B's requests for instructions to the jury, the Trial Court clearly and specifically negated any opportunity of Greenmoss to recover damages resulting from any presumption under defamation *per se* doctrines. The Court instructed the jury that a qualified privilege to defame protected D & B and that Greenmoss had the burden of proving the privilege was destroyed. The charged stated that:

> The conduct which would destroy the qualified

privileges of a commercial credit agency *must be more than mere negligence* or *want of sound judgment. It must show malice* or lack of good faith on the part of the defendant. If you find that the Defendant acted in bad faith towards the Plaintiff in publishing the erroneous report or that the Defendant intended to injure the Plaintiff in its business or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it. Respondent's Appendix A3. (Emphasis added.)

Significantly, Petitioner fails to point out to this Court that the Vermont Supreme Court specifically ruled that the charge not only afforded D & B the common law qualified privilege extended to credit reporting agencies but also gave it the benefits of the Constitutional privilege outlined in *Gertz*. The Vermont Supreme Court's decision states that:

> [W]e have carefully reviewed the jury instructions and in addition to being properly charged in line with our common law rules as to liability and damages, Defendant (D & B) was afforded a common law qualified privilege against credit reporting agencies *along with the ill-charged Constitutional privilege outlined in Gertz. In short, Defendant has nothing*

> *to complain about, since it received two beneficial charges to which it was not entitled.* Petitioner's Appendix A16 (emphasis added).

Accordingly, the Vermont Supreme Court has construed the instructions to the jury, *as a matter of fact and law,* to have included the *Gertz* standards. The Trial Court's instructions prevented Respondent from recovering any award of damages, either compensatory or punitive, unless the qualified privilege and the *Gertz* standard were satisfied.

SUMMARY OF ARGUMENT

The Vermont Supreme Court has ruled that the instructions to the jury were consistent with *Gertz*. Accordingly, the issue whether the First Amendment's limitations on damages for libel are applicable to non-media defendants in suits brought by purely private plaintiffs is not squarely before this Court since, as a pre-condition to considering this issue this Court must override the factual and legal conclusions of the Vermont Supreme Court.

Secondarily, this Court must determine whether the Petitioner appropriately presented the Trial Court with an opportunity to rule on the application of *Gertz* since *Gertz* was not presented as an independent basis for protection at the trial court level.

Thirdly, the issues in this case are of such minor significance in the overall structure of the law that their resolution by this Court is unnecessary. Accordingly, there is no substantial Federal question before this Court and there are no special or important reasons for the grant of Certiorari. As this Court has recognized, the entire law of defamation has not been preempted by federal Constitutional standards.

Fourthly, the result below was accurate, correct and the right result was reached. Finally, the result below was fair since Respondent won its case despite two jury instructions which heavily favored Petitioner including one which it erroneously contends was not given.

REASONS FOR DENYING THE WRIT

1. The Questions Presented For Review Are Not Squarely Before The Court.

Petitioner suggests that the issue of First Amendment protection for a non-media defendant in a suit by a purely private plaintiff is clearly before the Court in this cause. In fact, that issue is not squarely before this Court because several crucial pre-conditions to its consideration, which pre-conditions are factual in nature, must be addressed and resolved favorably to Petitioner prior to consideration of any Constitutional issue.

The first and most apparent obstacle to consideration of any Constitutional question is one not mentioned by Petitioner, namely, the finding of fact and legal conclusion of the Vermont Supreme Court that the standards established in *Gertz* were afforded to Petitioner in the instructions to the jury. Although *Gertz* should not be extended to non-media defendants, the jury charge not only was consistent with *Gertz* but exceeded the *Gertz* standards. *Gertz* requires that fault be shown to justify compensatory damages but stops short of ruling that the *New York Times v. Sullivan* standard of malice applies to compensatory damages. *See New York Times v. Sullivan,* 376 U.S. 254 (1964). The trial court's charge required the jury to find that there was

malicious or reckless publication of the report before *any* damages, including compensatory damages, could be awarded. The trial court's methodology was to impose the *New York Times v. Sullivan* standard of knowledge of falsity or reckless disregard of truth or falsity as a prerequisite to recovery of any damages. This standard was instructed in connection with the quantum of proof necessary to overcome the qualified privilege at common law of a credit reporting agency which the trial court extended to D & B.

By making the *New York Times* standard of malice an essential ingredient of its charge on the question of the qualified privilege, the court thus proscribed any recovery whatsoever, including recovery of compensatory damages, unless Greenmoss proved that D & B's actions met the *New York Times* standard. This included any recovery under the theory of libel *per se*.

Gertz acknowledges that in order to recover actual or compensatory damages, a plaintiff need not satisfy the *New York Times* standard of Constitutional malice. Indeed, under *Gertz,* even a negligence standard is permissable. However, in order to recover presumed or punitive damages, the *New York Times* standard must be met. Thus, even if *Gertz* does apply, the charge, when read as a whole, clearly presented the jury with not only the ingredients necessary to satisfy the *Gertz* test, but in fact exceeded the standards required by *Gertz* since *no* liability could be found and no damages of any nature could be awarded without satisfying the *New York Times* standard.

In reviewing the jury instructions, the Vermont Supreme Court held that the jury was instructed in accordance with

the Constitutional privileges outlined in Gertz. The Court observed that Petitioner received the benefits of this charge even though it was not entitled to it.

Thus, the initial consideration here does not, as Petitioner contends, involve a Constitutional question, but rather, a factual inquiry, namely, whether the Vermont Supreme Court correctly concluded as a matter of fact that the trial court's charge included the *Gertz* requirements. To reach the questions urged by Petitioner, this Court must first resolve against the Vermont Supreme Court and in favor of Petitioner a question of fact which has been decided by the highest court of the State construing a jury charge delivered by one of its Trial Courts. In addition to being a factual conclusion, the ruling of the Vermont Supreme Court on this point constitutes a legal interpretation by the State's highest court of the impact and legal effect of the jury instructions taken as a whole. *Curtis Publishing v. Butts,* 388 U.S. 130 (1975), mandates that the impact of a jury instruction must not be ascertained by merely considering isolated statements but must take into consideration all of the instructions given and the tendency of the proof of the case. The Vermont Supreme Court has followed *Butts* in ruling that Petitioner received the benefits of the *Gertz* standards in the charge.

Accordingly, even if the extension of *Gertz* to non-media defendants in "private figure" cases raises a substantial constitutional question, this case is not an appropriate vehicle for the resolution of the issue.

2. Petitioner Failed To Raise The Constitutional Questions In This Petition With Sufficient Clarity In The Proceedings Below.

Another obstacle to utilization of this case for consideration of the extension of *Gertz* to private plaintiff-non-media defendant actions is that Petitioner did not present the trial court with a sufficient opportunity to rule upon the questions which are presented for review here.

Prior to the rendition of the verdict, Petitioner never claimed that it was entitled to the protections of *both Gertz* and the common law qualified privilege made available by some courts to commercial credit rating agencies. Petitioner's Answer and Affirmative Defenses submitted to the Lower Court in November, 1977, asserted only a qualified privilege granted to credit reporting agencies. No Constitutional defense was asserted before trial. On the day trial started, Petitioner submitted its requests to charge the jury, (Respondent's Appendix B1-4) together with a memorandum entitled "Defendant's Memorandum of Law Concerning Existence and Nature of Qualified Privilege" (Respondent's Appendix C1-6). Petitioner argued therein that, in addition to the common law, to which it devoted most if its attention, an additional basis *for the existence of the qualified privilege* was the First and Fourteenth Amendments to the United States Constitution. Petitioner's Memorandum on the Existence and Nature of the Qualified Privilege gave scant attention to *Gertz* and presented *Gertz* as a subset or function of the qualified privilege and not as an independent ground for protection against libel complaints.

Accordingly, this case was tried as a common law libel

case with the claim of a qualified defamation privilege of a credit reporting agency as a crucial defense and had no overtones of First Amendment protection. Significantly, the Court charged the qualified privilege virtually as requested by Petitioner. There was nothing to indicate to the trial court that Petitioner was requesting *Gertz* be extended to non-media defendants as an independent ground of defense. Petitioner never put the trial court on sufficient notice that it claimed a separate basis for absolution from liability grounded on the Constitution.

Respondent submits that the point which Petitioner now seeks to raise was not adequately presented to the trial court. The test is whether the trial court has been so alerted to the claimed defense that it had a fair opportunity to gauge its application and utilize it if appropriate. As a matter of State law, this issue has been forfeited consistent with the decisions of the Vermont Supreme Court concerning a party's responsibility to present its position to the trial court with sufficient clarity and precision. *See Scanlon v. Hopkins,* 128 Vt. 626, 270 A.2d 352 (1970); *Dodge v. McArthur,* 126 Vt. 81, 223 A.2d 453 (1966). The Constitutional issue asserted here does not rise to the level of the "glaring error" test which forgives a party from its advocacy responsibility. *State v. Stockwell,* 142 Vt. 232; __A.2d__ (1982); *State v. Towne,* 142 Vt. 241, __A.2d__ (1982).

3. The Issues Presented Are Not Sufficiently Important To Warrant Review By This Court.

Grant of a Writ of Certiorari requires the exercise of this Court's extraordinary and discretionary jurisdiction. This case is simply of insufficient importance in the overall

structure of the law to merit resolution by the Court at this time. This case does not involve issues of major public import. Insofar as the law of libel is concerned, Greenmoss is neither a public official nor a public figure and D & B is, by its own admission, a non-media defendant and is not a consumer reporting agency. The content of the Petitioner's "speech" is clearly not public speech but rather is exclusively private, commercial speech.

Mercantile credit reports have generally been treated as private commercial expressions. As such, they are entitled to lesser protection than other Constitutionally guaranteed expressions. *Central Hudson Gas and Electric Company v. Public Service Commission,* 447 U.S. 557, 562-63 (1980); *Pittsburgh Press Company v. Human Relations Commission,* 413 U.S. 376, 384 (1972).

The issue sought to be reviewed is not whether *Gertz applies* to purely private plaintiffs and non-media defendants who are involved in defamation litigation, but rather, whether *Gertz* should be *extended* to defamation actions involving such parties. *Gertz* makes clear that the law of defamation is not to be solely decided by federal Constitutional standards. Indeed, in *Miskovsky v. Oklahoma Publishing Company,* __U.S.__ (1982) (no. 81-2407) *(denying cert.),* Mr. Justice Rehnquist observed that the entire law of defamation has not been preempted by federal Constitutional standards.

It does not help Petitioner to contend that the narrow issue in this case has not been resolved by this Court. There is no valid reason why the matter should be resolved by this Court. The fact that a given question has not been addressed has never been a recognized basis for the granting of Certiorari.

In two cases presented to the Court in the 1982 term, issues virtually identical to that submitted by this Petitioner were presented and Certiorari was denied. *Williams v. Pasma,* __Mont.__, 656 P.2d 212, *cert. denied* __U.S.__ (1983) (no. 82-1640); *Mertz v. Denny,* 106 Wisc.2d 636, 318 N.W.2d 141, *cert. denied,* __U.S.__ (1982) (no. 81-2376). The issue presented by Petitioner is a narrow issue, not broad enough to warrant review by this Court. The issue does not involve the press and does not involve the institution of the freedom of the press. It does not involve public figures or public officials. The facts of the case are not of public concern nor are they of national or intense local concern. This is simply dispute resolution between two private parties which involves a minute thread of the fabric of defamation law. No compelling reason exists for the exercise of this Court's energies to explore such an arcane area.

The scenario Petitioner portrays is that there is considerable disarray in the State and lower Federal Courts concerning the questions presented for review. However, a comparison of the issues in the cases cited by Petitioner with the questions in this Petition dramatically minimizes the claims of conflict. It is important to recognize that this case presents a purely private plaintiff and a non-media defendant which is not a consumer reporting agency. In addition, the defamation was not over an issue of public concern.

Petitioner cites *Avins v. White,* 627 F.2d 637 (3rd Cir.), *cert. denied,* 449 U.S. 982 (1980) in support of its position. However, *Avins* involved a plaintiff who was a public figure suing a private individual and the matter involved an issue

of serious public importance. The Court of Appeals for the Third Circuit specifically stated that it was *not* deciding whether the *New York Times* privilege extends to all private individual defendants regardless of the context and took pains to distinguish its result from its previous decision in *Grove v. Dun & Bradstreet, Inc.,* 438 F.2d 433 (3rd Cir.), *cert. denied,* 404 U.S. 898 (1971) in which it was held that the *New York Times* standard does not apply to disseminations made by a private credit reporting agency.

Similarly, *Davis v. Schuchat,* 510 F.2d 731 (D.C. Cir. 1975), also relied upon by Petitioner, is a case involving a plaintiff who was a public figure and a defendant who, although being a "private" defendant, was also a newspaper reporter who made defamatory statements to a number of people in the course of his preparation for a news story involving a matter of public concern. The Court in *Davis* does not specifically hold *Gertz* applicable to non-media defendants. The Court's ruling turned on plaintiff's status as a public official.

Woy v. Turner, 533 F. Supp. 102 (N.D. Ga. 1981) involved a plaintiff who was a public figure. The Court's focus in *Turner* was whether the plaintiff was a public figure, not whether *Gertz* applied to a non-media defendant.

The same analysis was utilized in *Bussie v. Larson,* 501 F.Supp. 1107 (M.D. La. 1980) in which the holding was specifically limited to defamation cases involving a public official or public figures. Interestingly, *Bussie* took pains to distinguish *Grove v. Dun & Bradstreet, Inc., supra.*

Throughout this litigation, Petitioner has placed extraordinary reliance upon *Jacron Sales Co. v. Sindorf,* 276 Md. 580, 350 A.2d 688 (1976). *Jacron* acknowledges

that the opinion in *Gertz* does not apply to non-media defendants. Curiously, however, *Jacron* relies upon the now rejected plurality theory of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) to support its position. Finally, *Jacron* applied the *New York Times* standard to a non-media defendant solely as a matter of Maryland state law and "wholly apart from any possible Supreme Court holding in the future based on Constitutional grounds." *See Jacron Sales Co. v. Sindorf,* 350 A.2d at 695-96. The Oregon Supreme Court in *Harley-Davidson Motorsports, Inc. v. Markley,* 279 Or. 361, 568 P.2d 1359 (Or. 1977) characterizes *Jacron* as a "most peculiarly reasoned case."

Decisions adjusting the rights of public figures and public officials as plaintiffs are totally inapposite to this case and it is fruitless to lump them together since different Constitutional considerations apply to public figures and public officials as plaintiffs in libel actions. *See* Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1419 (1975).

It has been suggested that, since *Gertz,* this court has consistently denied Certiorari or summarily dismissed appeals in defamation cases which could have served as vehicles for clarifying unresolved or questionable doctrinal issues. This has led some commentators to conclude that this Court, recognizing that all issues of defamation law do not have to be resolved with exclusive reference to federal Constitutional standards, has, consistent with its statements in *Gertz,* permitted the states to develop substantive defamation law. *See* Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law,* Rutgers-Camden Journal, 519, 520-22 (1979).

4. The Decision Below Gave Full Consideration To the Issues and Decided Them Correctly.

It seems clear that *Gertz* is exclusively a media decision. The repeated emphasis to the "media," "the press," "broadcasters," the "communications media," and the like leave no ambiguity as to whether the rules fashioned in *Gertz* were meant to extend beyond the press. They simply were not. *See* Eaton, *supra* at 1417. Indeed, it has been posited by Mr. Justice Stewart that *New York Times* and its progeny, including *Gertz,* do not suggest that the Constitutional theory of free speech gives an individual any immunity from liability for libel or slander. Instead, Mr. Justice Stewart has observed that *New York Times* and succeeding cases have nothing to do with freedom of speech but rather advance freedom of the press theorems soley. *See* Stewart, *Or Of The Press,* 26 Hastings L.J. 631, 635 (1975). Accordingly, Respondent submits that *Gertz* does not turn on free speech theory and rather is described more properly as a freedom of the press case. Its principles are therefore applicable only to the media. *See* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology,* 25 U.C.L.A. L. Rev. 915, 916, 930 (1978). Thus considered, *Gertz* has no application whatsoever to the instant litigation.

Even if free speech is involved in these cases, the Vermont Supreme Court correctly recognized that a balancing test between the legitimate rights of a defamed plaintiff and the Constitutional interest which may be threatened if the defendant is held financially accountable for its actions must be utilized in applying First Amendment protections in defamation cases. The Court

properly recognized that in private plaintiff-non-media defamation actions, the crucial elements which have brought the First Amendment into the field of defamation law are missing. In non-media defamation, there is no threat to the free and robust debate of public issues. There is no potential interference with meaningful dialogue of ideas concerning self-government and there is no threat of liability causing a reaction of self-censorship by the press. As *Gertz* itself recognizes, "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open debate on public issues.' " *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 340 (quoting *New York Times v. Sullivan, supra,* 376 U.S. at 270).

In the same paragraph in which this Court announced its holding in *Gertz,* it stated, "It (the holding) recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, it shields the press and broadcast media from the rigors of strict liability for defamation." 418 U.S. at 348. To provide a commercial business such as Dun & Bradstreet, which scrupulously limits who receive its commercial messages, with all the privileges available under the *New York Times* standard as well as the privileges which may be available to it at common law, would be a socially undesireable result at odds with the balancing test employed by the Court in *Gertz.* Uniformity has never been the blind quest of the law, yet Petitioner's essential argument here seeks to have the bland brush of symmetry render opaque the subtle factors which go into the Constitutional balance.

Petitioner's business involves very limited access publications. They are not designated to provide information on a general basis to the public at large.

Indeed, their purpose is to the contrary and is opposed to the *New York Times* rationale of free and uninhibited debate since their use is conditional upon maintaining confidentiality. [1]

When viewed from the Defendant's perspective, there is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. Furthermore, Petitioner controls its audience and the scope of its publications in advance of the publication. Thus, no difficulty exists in distinguishing between media and non-media defendants on the facts of this case.

Gertz emphasizes the legitimate interests that states have in protecting private individuals from defamation. This has been a long-standing and clearly settled doctrine in Vermont. *See Darling v. Clement,* 69 Vt. 292, 300, 37 A. 779, 781 (1897); *Michlin v. Roberts,* 132 Vt. 154, 318 A.2d 163 (1974); *Lancour v. Herald and Globe Association,* 112 Vt. 471, 28 A.2d 396 (1942). With media defendants, a private individual's right to recover for libel has been made more difficult because his interests have been outweighed by important constitutional issues. It does not follow that where those constitutional values are not involved recovery should face the same obstacles. Arguments based on simplicity and homogeneity have no place in the balancing test this Court has mandated for assessing the role of the First Amendment in defamation cases.

Simply stated, when the competing interests are placed on the scale, the strong and legitimate state policy of protecting individual reputations, which the Vermont Courts have long recognized, makes downweight and fully justifies

[1]See e.g., The conditions for use appearing at the bottom of Petitioner's Appendices E and F.

the decision below. The reputational interest, when considered against the interest of this Petitioner, properly and correctly inclines the scales to the conclusion reached by the Vermont Supreme Court. Indeed, Respondent submits that none of the factors which this Court utilized in applying First Amendment protections in *Gertz* are, when properly considered, available to this Petitioner. This Petitioner had a self-regulating mechanism to limit possible damage to reputations in the form of its pre-publication verification policy which it failed to utilize in this case. Moreover, this Petitioner, by virtue of its subscription system, has much greater flexibility in choosing how broad or limited a forum to use in its communications; it can and does direct its information to a select few whom it knows about in advance. These considerations are totally different than those which arise when media speakers such as the press and broadcast media are involved.

5. The Correct Result Was Reached By The Court Below.

Even if the principles set forth in *Gertz* should be extended to a purely private plaintiff against a non-media defendant, it is submitted that the result below is entirely correct. As respects compensatory damages, *Gertz* merely requires that states do not impose liability without fault. In media cases after *Gertz*, most states have employed a negligence standard. Indeed, the *Gertz* decision seems to have anticipated that a negligence standard would be utilized for media defendants. *See Denny v. Mertz,* 106 Wisc.2d 836,

318 N.W.2d 141, *cert. denied,* _U.S._, 103 S.Ct. 179 (1982) and cases cited therein.

In this cause, the trial court, despite its statement that Petitioner's publication constituted libel *per se,* prohibited the jury from awarding any damages, either compensatory or punitive, unless serious fault was shown. The fault required in the charge went well beyond negligence. Thus, to return its verdict, the jury must have found that Petitioner's actions constituted far more than merely negligence. The jury's findings that punitive damages were justified based on an instruction clearly consistent with *Gertz* leads to the conclusion that the jury was convinced Petitioner's actions constituted reckless disregard for the truth or falsity of the matter. Beyond that, Petitioner's opening statements to the jury and its briefs to the Vermont Supreme Court admitted it was negligent in connection with the publication of the report. Irrespective of Petitioner's concession of negligence, the evidence in this case is overwhelming that its conduct constituted, at the very minimum, negligence. Since negligence is a satisfactory standard to be adopted in determining compensatory damages under *Gertz,* Petitioner was clearly negligent and no retrial of this matter is necessary to establish such negligence.

As respects punitive damages, the Court charged that in order to get to the question, the jury must find actual malice, malice being defined with reference to the *New York Times* standard, must be proved by a clear preponderance of the evidence. This was clearly correct. Thus, even if *Gertz* were to extend to this action, the only modification in the charge would be that Greenmoss would have to prove negligence to support its compensatory damage verdict. Negligence abundantly exists here and has been admitted by Petitioner.

Therefore, the result below is correct. A restructuring of this case is unfair to Respondent, will not assist Petitioner and is a gesture of symbolism only.

6. A Fair And Appropriate Result Was Reached Below.

In this cause, the trial court instructed the jury in a manner consistent with *Gertz* as the Vermont Supreme Court held. In addition, it charged that, as a credit reporting agency, Petitioner enjoyed a common law qualified privilege to defame. This was an open question in Vermont at the time. Not only did the trial court instruct as to the existence of a common law privilege, but, in adopting Petitioner's request to charge on the scope of the privilege, delivered an instruction that strongly favored the Petitioner and highly disadvantaged the Respondent. Of the cases construing the credit reporting agency privilege in other jurisdictions, the lower court selected a standard that was the most favorable to Petitioner of all the decided cases. *See, e.g., Restatement, (Second) Torts* §595. Despite this rather Draconian charge, Respondent prevailed.

The Vermont Supreme Court ruled, solely as a matter of state common law, that a credit reporting agency does not have a qualified privilege to defame and therefore, D & B received at least two jury instructions to which it was not entitled. Although Petitioner has, appropriately, not asserted the ruling of the Vermont Supreme Court concerning the common law privilege as a question for review here, the trial court's inclusion of that instruction and the jury's subsequent verdict despite the instruction, demonstrate that the result below is fair and appropriate

considering the facts of this case. It also demonstrates that the application of *Gertz* to this case would not benefit the Petitioner in any consequential respect. Under the trial court's charge, Respondent had to show malice to recover any verdict whatsover. Thus, the Petitioner was, at the trial level, afforded even more protection than it now claims it was deprived of.

CONCLUSION

This case does not present an appropriate vehicle for the resolution of the questions urged by Petitioner. Moreover, those questions are not significant or important and, in view of the facts in this case, are at best artificial and hypothetical. The petition ignores that a jury charge more stringent than *Gertz* mandates was in fact delivered to the jury.

Petitioner makes this case out to be more than it actually is and seeks to exalt uniformity over logic which is inimical to the balancing methodology employed in First Amendment defamation litigation. Lastly, Petitioner cannot show that any different outcome would have occurred in the proceedings below. For all of the foregoing reasons, the Petition for Certiorari should be denied in its entirety.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT WASHINGTON COUNTY MARCH TERM

GREENMOSS BUILDERS *
*
vs. * DOCKET NO. S326-77Wnc
*
DUN & BRADSTREET *

JURY CHARGE

* * * *

Now in this case I'm going to discuss with you the defamation aspects of it and the damage questions that may be related to it. The Plaintiff, as you know, Greenmoss Builders, Inc. has filed suit seeking compensatory and punitive damages on account of an alleged libel and defamation in the form of a Report issued by Dun & Bradstreet on July 26, 1976 in which it was erroneously reported that the Plaintiff had filed for bankruptcy. A libel is a false and defamatory statement negligently or recklessly published of and concerning the Plaintiff which tends to injure its reputation in the eyes of a substantial, respectable group, even though they are a minority of the total community, or of the Plaintiff's associates. A corporation is deemed a person under our law, and like a person, a corporation may be the subject of a libel. The Defendant in this case has conceded that the report of Plaintiff's bankruptcy was false and erroneous; that the Report was published to others by the Defendant is also uncontested. Words which tend to injure the Plaintiff in

its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed. In the present case, I instruct you that the Defendant's Erroneous Report of the Plaintiff's bankruptcy constitutes libel as a matter of law unless you find that the Defendant was privileged to make that Report and publish it to subscribers. Under the law, a commercial credit rating agency enjoys a qualified privilege in making reports to its subscribers. This means that a commercial credit rating agency cannot be held accountable for erroneous statements which are merely negligent. This is because commercial rating agencies are deemed to serve a legitimate business need which might not be met in the absence of the privilege. The Defendant has the burden of proving that it is a commercial credit rating agency, and I don't think there's any dispute about that in this case. If you determine that the Defendant is a commercial credit rating agency, the qualified privilege will apply; however, this is but a qualified privilege. If a commercial credit rating agency publishes an Erroneous Report to customers other than those who had recently requested credit information regarding the subject of a report, the agency has abused the privilege and may be held liable. In addition, if an Erroneous Credit Report is maliciously or recklessly made by a commercial rating agency, the agency is not entitled to the protection of that privilege. So in terms of the case before you, if you determine that the Defendant is ordinarily covered by the qualified privile you must then determine whether that privilege has been abused, either by excessive publication to customers who have not requested credit

information regarding the Plaintiff, or by malicious or reckless publication of the report. The Plaintiff has the burden of proving that the privilege has been destroyed. The conduct which would destroy the qualified privileges of a commercial credit agency must be more than mere negligence or want of sound judgment. it must show malice or lack of good faith on the part of the Defendant. If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequence, or if it was made with the knowledge that it was false or with reckless disregard of it's truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it.

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefor relieves the Plaintiff of the burden of establishing by specific proof that

damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgement you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages *actually* caused by the Defendant.

Now a word or two about punitive damages. If you find that Defendant's conduct was not *privileged,* and if you also find, on the basis of *clear and convincing evidence,* that the Defendant acted with *actual malice* in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the *actual* damages assessed.

APPENDIX B

STATE OF VERMONT) WASHINGTON SUPERIOR COURT
:SS.
COUNTY OF WASHINGTON) Docket No. S-326-77 WnC

GREENMOSS BUILDERS, INC.)
)
v.)
)
DUN & BRADSTREET, INC.)

DEFENDANT'S REQUESTS TO CHARGE JURY

NOW COMES DUN & BRADSTREET, INC., defendant in the above-captioned action, by and through its attorneys, Young & Monte, and requests pursuant to Rule 51(b) the following charges to the jury:

1. You may not return a verdict against the defendant merely because defendant published an erroneous report of plaintiff's bankruptcy if you find that the circumstances of this publication were such that a qualified privilege exists. Thee law requires that you must extend a qualified privilege to the defendant if you believe that the defendant has proved by a preponderance of the evidence that it is a commercial credit reporting agency and that defendant furnished the erroneous report only to its customers who had requested credit information concerning the plaintiff. If you determine that a qualified privilege should be applied in this case by application the foregoing rule, then you may find for the plaintiff and against the defendant in any amount only if you believe that the plaintiff has proved by a preponderance of the evidence that the

defendant exceeded its privilege by acting with malice when it published the erroneous report. If you determine that this qualified privilege should apply, then you must return a verdict for the defendant unless you believe that the facts, as proved, establish malice.

2. The word "malice" has a specific legal meaning in this context. More than mere negligence or want of sound judgment and more than hasty or mistaken action is required to establish malice. In this context, "malice" means the intentional doing of a wrongful act without just cause or excuse. *Nott v. Stoddard,* 38 Vt. 25, 32 (1865), *Hedman v. Siegriest,* 127 Vt. 291, 294 (1968), *Partridge v. Cole,* 96 Vt. 281, 285 (1923), *Judd v. Challoux,* 114 Vt. 1, 4 (1944). Plaintiff has the burden to persuade you by a preponderance of evidence that the defendant's conduct in this case amounted to malice as I have defined it.

3. (Defendant requests the following charge if the Court charges the jury to the effect that actual damages need not be specifically proven in a case of libel *per se,* but not otherwise:)

> Although the law presumes damage in some amount in a case of libel *per se,* and therefore relieves the plaintiff of the burden of establishing by specific proof that damages have occurred, [the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have, in fact, occurred.] It is proper, if in your judgment you deem it to be correct, even in a case of libel *per se* for you to return a verdict of only nominal damages, such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the

> plaintiff for the damages actually caused by the defendant.

4. Any award of damages which you may make to the plaintiff in this case must be limited to damages suffered by the corporate plaintiff itself and your award may not reflect any damages which you may believe were suffered by anyone othe than the plaintiff corporation, including the individuals who may be officers, shareholders, or otherwise connected with the corporate plaintiff.

5. In defamation actions, the law requires that you consider whether the defendant has taken any steps to mitigate any damages which the plaintiff may have sustained.

6. Mitigation of damages is action taken by the defendant to lessen the extent of severity of the injury sustained by the plaintiff because of the defendant's conduct. 50 Am Jur 2d, *Libel and Slander,* § 375.

7. If you find that the defendant took steps such as notifying the persons to whom it published the erroneous report of bankruptcy to the effect that that report was in error, apologized to plaintiff, or otherwise made an effort to lessen the extent or severity of plaintiff's damages, then you must take this mitigating conduct of the defendant into account in determining the amount of damages, and you must lessen your award of damages to the extent that you believe is appropriate in all of the circumstances.

DATED at the Town of Northfield, County of Washington, and State of Vermont this 7th day of April, 1980.

DUN & BRADSTREET

By Its Attorneys
YOUNG & MONTE

By _____
Peter J. Monte

cc: Thomas L. Heilmann, Esq.

APPENDIX C

STATE OF VERMONT) WASHINGTON SUPERIOR COURT
:SS.
COUNTY OF WASHINGTON) Docket No. S-326-77 WnC

GREENMOSS BUILDERS, INC.)
)
v.)
)
DUN & BRADSTREET, INC.)

DEFENDANTS MEMORANDUM OF LAW CONCERNING EXISTENCE AND NATURE OF QUALIFIED PRIVILEGE

THIS ACTION was brought by Greenmoss Builders, Inc. against Dun & Bradstreet, Inc., for damages from an alleged defamation of the plaintiff by the defendant. The defamation complained of was a report by Dun & Bradstreet, Inc., on or about July 26, 1976, to the effect that the plaintiff was bankrupt and which included an allegedly erroneous statement of the plaintiff's assets and liabilities. Defendant admits that its July 26, 1976, report concerning the plaintiff erroneously attributed bankruptcy to the plaintiff and understated plaintiff's assets and liabilities.

Defendant does not concede, however, that this erroneous publication establishes its liability in this matter. Defendant submits that there is a qualified privilege extended to it as a commercial credit reporting agency and that because defendant has not abused this privilege, it is not liable to plaintiff on the complaint. The purpose of this memorandum is to state the defendant's authority and argument regarding the existence of this privilege and its position that defendant has not in this case exceeded the privilege.

EXISTENCE OF QUALIFIED PRIVILEGE

The Vermont Supreme Court has not been called upon to rule directly on the question of whether or not a qualified privilege is extended in defamation actions such as the one at bar. The overwhelming weight of authority in other jurisdictions, however, extends a qualified privilege in defamation actions to merchantile or credit reporting agencies. In fact, defendant is aware of only two states which deny this qualified privilege. In Georgia, conditional privileges are statutorily defined, *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886); and, in Idaho, the courts have not addressed the question since 1914, *Pacific Packing Co. v. Bradstreet Co.*, 25 Idaho 696, 139 P. 1007 (1914).

The qualified privilege which is a part of the common law of most jurisdictions may be stated as follows: A qualified privilege exists which insulates a commericial credit reporting agency from liability for otherwise defamatory statements if the statement is made by the credit reporting agency in confidence and in good faith to its customers which have requested the information and have a legitimate business interest in the information. See e.g., *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, (CA 10 Kan.) 448 F.2d 647, cert. den. 405 U.S. 1026; *Petition of Retailers Commercial Agency, Inc.*, 343 Mass. 515, 174 N.E. 2d 376; *H.E. Crawford Co. v. Dun & Bradstreet, Inc.* 241 F.2d 387 (4th cert. 1957); *Ford Motor Credit Co. v. Holland*, 367 A 2d 1311; *O'Neill v. Dun & Bradstreet, Inc.*, 456 S.W. 2d 96 (1970 Tex); *Roemer v. Retail Credit Co.*, (1970) 3 Cal App 3d, 83 Cal Rptr 540, Restatement (Second) Torts, Scope note preceding § 393 (1977); 40 ALR 3d 1049 at seq., 30 ALR 2d 770, 776; 15 Am Jur 2d, *Collections and Credit Agencies*, §§ 26, 27.

Although the Vermont Supreme Court has never decided a case which called into issue the specific privilege which is the subject of this memorandum, the Vermont law clearly recognizes the principles and considerations which underlie the cases in other jurisdictions establishing the qualified privilege in question. In *Nott v. Stoddard*, 38 Vt. 25, 32 (1865), a defamation action, the Vermont Supreme Court stated:

> [W]hen the words are defamatory, the law infers malice and a question of malice is not submitted to the jury except upon the question of damages, unless the occasion of speaking the words is such as to rebut that inference and render the speaking prima facia excusable; in which case the *plaintiff cannot recover unless there is malice in fact. Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character*...These cases are an exception to the general rule that malice be presumed as a matter of law. (Emphasis added)

Thus has the Vermont Supreme Court recognized the common law rationale which underlies the existence of the qualified privilege. That rationale is that public policy fosters the exchange of necessary information without strict liability for errors made in good faith when there is an important public purpose being served by the disclosure of the information. Vermont specifically recognizes confidential advice for a legitimate purpose in communications to persons who have asked for information and have a right

or interest to know the information as falling within the area protected by this public policy.

The case at bar illustrates the wisdom of this public policy. Our economic system is dependent upon the availability of credit which, in turn, depends upon a lender obtaining information about the borrower so that an informed decision about the prospects of repayment can be made before credit is extended. A lender cannot be left to rely solely on information provided by the borrower and must obtain information from other sources less subject to bias. It is obviously unrealistic to expect that a free flow of essential information would exist if strict liability were imposed on all persons who respond in good faith to a credit inquiry. In order, therefore, to encourage the good faith exchange of information for legitimate purposes, a *qualified* privilege was crafted by the courts at common law. This qualified privilege is not a license because, if abused, the privilege is lost.

There is a second rationale which underlies some court's decisions in favor of the creation of this qualified privilege. This second rationale is that the First and Fourteenth Amendments of the United States Constitution apply to actions for defamation, even those involving non-media defendants. See e.g., *Marchesi v. Franchino,* 387 A.2d 1129 (1978); *Jacron Sales Co., Inc. v. Sindorf, 276 Md. 58, 350 A.2d 688 (1976); Millsaps v. Bankers Life Company,* 35 Ill App. 3d 735, 342 N.E. 2d 329 (1976); Restatement (Second) Torts § 580 B. See also, *The Supreme Court,* 1973 Term, 88 Harv. L. Rev. 41, 148, n. 52 (1974). These authorities conclude that it would violate the provisions of the First and Fourteenth Amendments of the United States

Constitution to impose strict liability for defamation.

These authorities extend the rationale of *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) beyond defamatory utterances published by communications media. The rationale of this extension is recited by The Restatement (Second) Torts § 580 B, comment (e), as follows:

> As the Supreme Court declares, the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.
>
> ....There is little reason to conclude that the states would now be disposed to take the traditional strict liability approach for libel actions against the communications media, which has now been declared unconstitutional, and apply it to slander actions against private individuals, where it has not previously been significant.

For views and substantial accord with this rationale, see *The Supreme Court,* 1973 Term, 88 Har. L. Rev. 41, 148 n. 52 (1974); Anderson, *Libel and Slander, Press Self-Censorship,* 53 Tex. L. Rev. at 442.

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DATED at the Town of Northfield, County of Washington, and State of Vermont this 7th day of April, 1980.

DUN & BRADSTREET, INC.

By Its Attorneys
YOUNG & MONTE

By _____
Peter J. Monte

By _____
Brian R. Lyford